United States Court of Appeals

for the Second Circuit

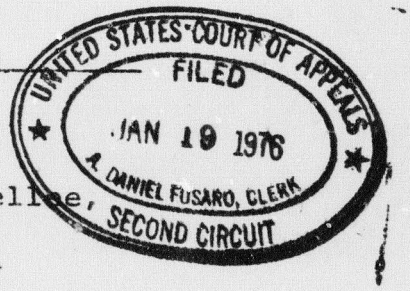
APPELLANT'S BRIEF

75-7060 75-7641

To be argued by
SHELDON ENGELHARD

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



JAPAN AIR LINES COMPANY, LTD.,

Plaintiff-Appellee,

-against-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM"); IAM DISTRICT LODGE NO. 151; FUSAO OGOSHI, individually and as Senior Business Representative of IAM District Lodge No. 151; ROBERT QUICK, individually and as Grand Lodge Representative of IAM; ROLLO SAVINO, GREGORY McLAUGHLIN, WILLIAM WHITBREAD, MAX SUZUKI, TATSUO SHIRAISHI, STANLEY NAGAOKA, YOSHIAKI KARASHIMA, GARY HIROSHIMA and HIROSHI TARUMI, individually and as representatives of a class consisting of all of plaintiff's employees represented by IAM and employed in the United States,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS
Appeal from United States District Court for the Southern District of New York

---

SHELDON ENGELHARD,
DEBORAH A. WATARZ,
ROBERT JAUVTIS
Of Counsel.

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Defendants-Appellants
1501 Broadway
New York, N.Y. 10036
(212) 221-2550

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

OTHER AUTHORITIES

TABLE OF STATUTES AND RULES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The first question presented to this Court is whether the Court below erred in issuing a temporary restraining order preventing defendants from engaging in "self-help" and enjoining defendants from bargaining with respect to a certain "scope" proposal while requiring them to bargain with respect to all other issues, where the parties are subject to the provisions of the Railway Labor Act (45 U.S.C. §§ 151 et. seq.) and where the parties are engaged in a "labor dispute" as defined in the Norris LaGuardia Act (29 U.S.C. §§ 101 et. seq.). This Appeal also presents for review the question of whether a temporary restraining order may exceed five (5) days where the parties are engaged in a labor dispute and where the defendants have not been afforded reasonable opportunity to present opposing witnesses at a hearing wherein injunctive relief was sought and where the court failed to make the findings of fact set forth in 29 U.S.C. §107.

2. The second question presented to this Court is whether the defendants' proposal for a change in a contract which provides for the phasing out of sub-contracting (known as "the Scope proposal") is a mandatory subject of bargaining under the Railway Labor Act.

PRELIMINARY STATEMENT

This appeal is a consolidation of two appeals docketed with this Court which arose out of an action commenced in the United States District Court for the Southern District of New York by plaintiff, JAPAN AIRLINES CO., LTD, (hereinafter "JAL") against defendants International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter "IAM") and others. The first notice of appeal assigned Docket No. 75-7060, was filed on January 23, 1975. It is an appeal from a temporary restraining order issued by Judge Robert J. Ward of the United States District Court at 5:15 p.m. on January 22, 1975. The second notice of appeal was filed on November 13, 1975 and was assigned Docket No. 75-7641. It is an appeal from a final declaratory judgment of Judge Robert J. Ward entered on October 17, 1975.

JAL commenced the action on January 13, 1975. In its complaint JAL sought a permanent injunction preventing defendants from bargaining over a proposal concerning sub-contracting of maintenance and ground service work at various of its stations in the mainland United States (hereinafter referred to as the "Scope" proposal) and from striking or otherwise

engaging in self-help with respect to bargaining over the "Scope" issue. The IAM was served on January 14, 1975 with a Summons, Verified Complaint, and an Order to Show Cause signed by Honorable Robert J. Ward, Judge of the United States District Court for the Southern District of New York, seeking preliminary injunctive relief, made returnable before Judge Ward on January 16, 1975. On the return date counsel for the defendants made an oral motion to transfer the action to the United States District Court for the District of California pursuant to 28 U.S.C. §1404 (Tr. p.6)* ( ); the motion was denied. Defendants' counsel then made an application to continue the "hearing" on plaintiff's motion for a preliminary injunction to afford them the opportunity to have witnesses, all of whom were in California, appear and testify in opposition to the motion; the District Court likewise denied this application (Tr. p.39) ( ). A hearing was thereupon held at which only plaintiff's witnesses testified and decision was reserved.

On January 22, 1975, Judge Ward granted a motion by JAL for a temporary restraining order ("TRO") pending the deter-

*(Tr.____) references are to pages and exhibits in transcript of proceedings before Hon. Robert J. Ward, held January 16 and January 22, 1975. (___) references are to deferred appendix.

mination of the decision on the motion for the preliminary injunction. The TRO was to expire by its terms on January 31, 1975, at 5 p.m. ( ). In addition to prohibiting defendants from engaging in "self-help", the TRO required them to bargain with JAL on all issues other than "Scope". A $50,000 Bond was posted by JAL ( ). On January 23, 1975, defendants filed a Notice of Appeal from the Order of Judge Ward, dated January 22, 1975, granting the TRO, which was initially issued for more than five days.

Additional days of hearing on the preliminary injunction were held before Judge Ward on successive dates in January and February 1975. Judge Ward extended the temporary restraining order issued on January 22, 1975 for two successive periods up to and including February 19, 1975 when he issued his Opinion denying plaintiff's application for a preliminary injunction ( ). Defendants did not appeal from the two extensions of the TRO. The parties agreed (Order of Ward J., 10/15/75 - p.2) ( ) to treat the evidence presented at the hearing for a preliminary injunction as a trial on the merits and Judge Ward issued a final declaratory judgment on the basis thereof on October 14, 1975.

STATEMENT OF FACTS

The IAM and JAL were parties to a collective bargaining agreement which, by its terms, expired October 31, 1973 (Tr. Def. Exh. A) ( ). Prior to an initial negotiating session for a new contract on November 6, 1973, the IAM served a notice of its proposed changes in the agreement pursuant to Section 6 of the Railway Labor Act (hereinafter RLA). One change related to an amendment of Article I, Section D of the collective bargaining agreement (Tr. Def. Exh. A, pp 1-2) ( ). Article I reads as follows:

ARTICLE I

Scope of Agreement

A. The Union is recognized by the Company as the sole collective bargaining agent for those employees of Japan Air Lines Company, Limited based in the United States, its territories and possessions, who comprise the craft or class of Airline Mechanics, including Ground Service and Ramp employees, said Union having been certified as representing those employees by the National Mediation Board in Case R-3303 on December 9, 1958.

B. This Agreement is made between the Company and the Union to cover employees comprising the craft or class of Airline Mechanics, including Inspectors, Storekeepers, Ground Service and Ramp Employees, and Leads in said classification, employed by the Company.

C. This Agreement is made to cover all work involved in the operation and/or maintenance of aircraft, or parts thereof, aircraft engines, ground equipment and facilities, loading, stowing and unloading of all cargo, and any work incidental thereto coming within the jurisdiction of the Union.

D. If, during the life of this Agreement, the Company should establish its own maintenance, ground service or stores facilities at any other base within the United States, its territories and/or possessions, the Company and the Union will meet and negotiate wage rates and other conditions to govern the employees at the new base only prior to, or as near as possible after, the opening of the facility.

The amendment would add:

> "That during the life of this Agreement, the Company shall phase out the contracting of all work covered by this Agreement and employ its own personnel to perform such work."

Negotiations commenced in November, 1973 (Tr. p.43) ( ) and after many sessions, discussing at various times all issues, including "Scope", the parties sought the assistance of a National Mediation Board Mediator pursuant to the RLA. Despite several meetings at each of four different mediation sessions, the parties

reached an "impasse". The plaintiff then requested the National Mediation Board to proffer arbitration on all issues except "Scope"; the IAM did not accept (Tr. pp. 54, 55) ( ). On December 23, 1974 the parties, having exhausted all of the procedures prescribed by the RLA, were "released" by the NMB and therefore, following the statutory thirty day "cooling off" period would have been free to engage in "self-help" starting January 23, 1975. (Tr. p.56) ( ). Although when this action was commenced the parties were within the thirty day "cooling off" period, they, nevertheless, voluntarily continued to engage in collective bargaining. (Tr. p.57) ( ).

During the course of negotiations the IAM maintained that the amendment of Article I, section D ("Scope") was necessary to maintain and foster job security. This need was further made manifest during the negotiations when the IAM was informed that JAL was going to furlough 9 employees. The IAM instituted a lawsuit in the United States District Court in Hawaii which resulted in a withdrawal of the furlough notice (Tr. Def. Ex. D, affidavit of Fusao Ogoshi, sworn to January 18, 1975, at p. 13) ( ).

Significantly, at no time prior to the last mediation session on November 13, 1974, did JAL ever take the position that it was not required to bargain about "Scope" (Tr. 160, 161, 169-171) ( ). Indeed, even during the negotiations leading to the last collective bargaining agreement (Tr. Def. Ex. A) ( ), a modification of the Scope clause was an issue which, as the result of the collective bargaining process, was settled in return for agreements designated as Appendix "D" and Appendix "E" to that agreement (Tr. Def. Ex. A., pp. 67-70) ( ).

At the time that the underlying action was commenced, the parties had not reached agreement on many important and substantial issues besides "Scope" such as, "wages" and a revision of the "pension" plan and numerous others. (Tr. pp. 157, 165) ( ). The TRO issued on January 22, 1975 effectively withdrew the IAM's right to engage in "self-help" regarding all of those other open and unresolved issues and extended the statutory "cooling off" period. It was issued without affording defendants an opportunity to present witnesses or testimony in open court (Tr. p. 41) ( ). After completion of a full hearing on the preliminary injunction in February, Judge Ward denied plaintiff's request for preliminary injunctive relief.

He found, inter alia, that the "Scope proposal was not a mandatory subject of bargaining under the RLA, and therefore there was no judicially enforceable duty to bargain about it.

Defendants appeal from (1) the issuance of the TRO, (2) the determination that the "Scope" proposal was not a mandatory subject of bargaining.

POINT I

THE TEMPORARY RESTRAINING ORDER WAS IMPROPERLY GRANTED AND SHOULD THEREFORE BE VACATED.

A. THE ORDER OF THE COURT BELOW IS AN APPEALABLE ORDER PURSUANT TO 28 U.S.C. § 1292 (a) (1).

The Order of the Court below, dated January 22, 1975, restrained and enjoined the IAM from inter alia:

1) Bargaining about proposed modification of the "Scope of Agreement" article in the previous collective bargaining agreement; and

2) Engaging in any form of economic self-help to induce the making of a new collective bargaining agreement.

That Order was designated a "Temporary Restraining Order" to be effective from January 22, 1975 until 5pm January 31, 1975, a period of nine (9) days.

Plaintiff-appellee (hereinafter "JAL") contends, quite simply, that because the Order of the Court below is labelled a temporary restraining order, it cannot be appealed. However, upon closer analysis, it will be shown that that Order was effectively a preliminary injunction and not a TRO. As this Court stated in Grant v. United States, 282 F. 2d 165, 167 (2d Cir. 1960), "(T)he label put on the order by the trial court is not decisive." Concur. Belknap v. Leary 427 F 2d 496, 498 (2nd Cir. 1970); Glen-Arden Commodities, Inc. v. Costantino 493 F 2d 1027, 1030 (2nd Cir. 1974), n.2.

What is decisive was set forth by the holding of this Court in Pan American World Airways v. Flight Engineers Int. Assoc., 306 F. 2d 840, 843 (2nd Cir. 1962):

> "We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U.S.C. § 1292 (a)(1). Sims v. Greene, 160 F. 2d 512 (3d Cir. 1947); Missouri-K-T R.R. Co. v. Randolph, 182 F. 2d 996 (8th Cir. 1950); Western Union Telegraph Co. v. United States and Mex. Trust Co., 221 F. 545, 553 (8th Cir. 1915); Grant v. United States, supra, 282 F. 2d 167-168 (dictum); see 7 Moore, Federal Practice, ¶65.07 (2nd Ed. 1955); 3 Barron & Holtzoff, Federal Practice and Procedure, § 1440 (Wright ed. 1958)."

The key phrase in the above quotation is "beyond the period of statutory authorization." Thus it becomes most significant to identify what the period of statutory authorization is.

The IAM contends that the Order of the Court below arises out of a "labor dispute" and is clearly governed by the provisions of the Norris-LaGuardia Act (29 U.S.C. § 101 et seq.). Specifically, § 107 of that act provides that a temporary restraining order issued in cases growing out of labor disputes "shall be effective for no longer than five days and shall be void at the expiration of said five days." No mention is made of a longer period, nor is there any provision relating to extensions.

In support of its authority to issue a nine (9) day "temporary restraining order," the Court below ostensibly relies upon F.R.C.P. Rule 65 (b) (not an Act of Congress) which allows for temporary re-

straining orders not to exceed ten (10) days (with a provision for extension). The reliance of the Court below upon Rule 65 (b) is, however, plainly misplaced. Indeed, Rule 65 (e) expressly states: "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." In fact Rule 65 (e) in its present form is a broadening of the language of the former (pre-1948) Rule, which stated that it did not modify the "Norris-LaGuardia Act." See 7 Moore's Federal Practice ¶65.03 (2) (2nd Ed. 1974).

Therefore, it should be apparent that the Order of the Court below exceeded its statutory authorization by a period of four (4) days. The danger inherent in such a ruling was aptly stated in the Pan American World Airways case, supra, recently cited with approval by the United States Supreme Court in Sampson v. Murray, 415 U.S. 61, 86 f. 58 (1974). The words of Judge Hays were (at 843):

> "The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. Such an order is necessarily limited to a very brief period because what may later prove to be a right of the party who is restrained is suspended before even a tentative adjudication as to that right has been had. A union, for example, may have a perfect right to strike and may have chosen a particularly opportune time for doing so. By the issuance of a temporary restraining order a court, without adjudicating the basic right, prohibits the strike. The longer the period of such prohibition the greater the chance that the right will be completely frustrated because the opportunity once suspended may, as a practical matter, be lost. And frequently recovery on the bond will not compensate adequately

> for the suspension or loss of the right involved. It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65 (b) [The Court did not deal with the issue of whether the five (5) day limitation of the Norris-LaGuardia Act (29 U.S.C. § 107) properly governed.] by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.
>
> It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgement rule to permit review of preliminary injunctions. 28 U.S.C. § 1292 (a)(1). To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued without a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision. [emphasis supplied]

While the above opinion dealt with the extension of a previously issued temporary restraining order, there is no meaningful distinction between an order which is extended for a period beyond its statutory authorization and one, such as the order of the Court below, which is ab initio to be effective for a period clearly in excess of the time provided by statute.

The validity of the above analysis was upheld by the Eighth Circuit in Telex Corp. v. International Business Machines Corp., 464 F. 2d 1025 (8th Cir. 1972). There, the Court stated (at 1025):

> "This matter was heard on an expedited appeal from the district court's entry of a 'temporary restraining order' dated July 21, 1972. The order entered by the district court enjoins I.B.M. inter alia from announcing certain new products on or about August 2, 1972, and until such time that Telex Corporation's

> motion for preliminary injunction is heard and submitted to the district court on or before September 1, 1972. In view of the fact that the lower court's order exceeds the ten day limitation as set forth in Rule 65(b) of the Federal Rules of Civil Procedure, this court finds that the order so entered is tantamount to an issuance of a preliminary injunction and that the order entered on July 21, 1972, is an appealable order. See Pan American World Airways, Inc. v. Flight Engineers's International Association, 306 F. 2d 840 (2nd Cir. 1962); Missouri-Kansas R.R. v Randolph 182 F. 2d 996 (8th Cir. 1950)." [Emphasis supplied]

The case here is clearly distinguishable from the holding in IIT v. Vencap, Ltd., 519 F. 2d 1001 (2nd Cir., 1975). That case involved an action for fraud, waste and conversion. On July 3, 1974, the district court enjoined defendants from utilizing or exercising control over the assets of the defendant corporations and appointed a receiver. The plaintiffs did not take an appeal from the order. On August 2, 1974, the district court modified its order, liberalizing the terms of the receivership and expressly permitting Vencap to continue engaging in investing venture capital. The plaintiffs did not take an appeal from this supplemental order. On September 3, 1974, the court made an order, based upon the receiver's report, permitting certain assets of one of the defendants to be expended by check for a mining concession in the Cameroons. Plaintiffs unsuccessfully moved to stay this order and, on appeal, the Second Circuit affirmed, refusing to interfere with the discre-

tionary administrative supervision of the federal district court of its appointed receiver. Moreover, the circuit court found, since the plaintiffs did not appeal from a modification of the initial order permitting Vencap to continue its investments, they could not be heard to appeal an administrative decision pursuant to the order at a later date, having failed to do so in the first instance. The factual context in which the IIT case arose, and the necessity of the circuit court's deferral to the district court in supervising its receiver - analogous, as the court noted, to proceedings under the Bankruptcy Act - renders the decision there irrelevant to the instant case. Judge Friendly did not, in any event, express an intent to overrule his position in Hoh v. Pepsico, Inc., 491 F. 2d 556, 560, that a temporary restraining order that, irrespective of the label given it, has the effect of a preliminary injunction is appealable.

In light of the fact that the case herein is governed by the Railway Labor Act (45 U.S.C. § 151 et seq.), which evidences a clear legislative intent to allow the parties in a major dispute to engage in economic self-help after the statutory procedures have been fully exhausted, there should be no hesitance on the part of this Court to find that the order of the Court below was tantamount to the issuance of a preliminary injunction and, therefore, properly appealable.

B. THE COURT BELOW IGNORED THE JURISDICTIONAL LIMITATIONS OF THE NORRIS-LAGUARDIA ACT.

Where parties are involved in a "labor dispute" a Court lacks jurisdiction under the provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101 et.seq.), except under the most extreme circumstances, to issue any restraining order -- temporary or permanent.

The United States Supreme Court emphasized in Order of Railroad Telegraphers v. Chicago and North Western Railway Co., 362 U.S. 330 (1960) that:

> "Section 4 of the Norris-LaGuardia Act specifically withdraws jurisdiction from a District Court to prohibit any person or persons from 'ceasing or refusing to perform any work or to remain in any relation of employment' 'in any case involving or growing out of any labor dispute' as 'herein defined.' Section 13(c) of the Act defines a labor dispute as including, 'any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.' Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. Section 2 of this Act specifies the public policy to be taken into consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; it is one of

> freedom of association, organization, representation and negotiation on the part of workers. The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against non-judicial intervention in labor disputes had been given unduly limited constructions by the courts." (at p. 336)

In issuing the TRO, the Court below relied on the decision of the United States Supreme Court in Chicago & North Western Railway Company v. United Transportation Union, 402 U.S. 570 (1971). While the Supreme Court, in discussing the proscriptions of Norris-LaGuardia, held that

> "...[S]trike injunctions may issue when such a remedy is the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements..." (at p. 583)

the defendant railroad in that case had refused to bargain about certain major issues during contract negotiations as they were required to do under the RLA. In contrast, here it is plaintiff JAL who refused to bargain about "Scope", one of the major proposals of the IAM. Rather than bargain, JAL sought an injunctive order which would allow it to continue to refuse to bargain.

The Supreme Court had the foresight, however, to envison the very same conduct engaged in here by JAL in recognizing the

> "...[D]anger that parties will structure their negotiationg positions and tactics with an eye on the courts, rather than restricting their attention to the business at hand. Moreover, the party seeking to maintain the status quo may be less willing to compromise during

> the determinate processes of the Railway Labor Act if he believes that there is a chance of indefinitely postponing the other party's resort to self-help after those procedures have been exhausted. See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380-381, 70 LRRM 2961 (1969)... Finally, the vagueness of the obligation under § 2 First could provide a cover for free-wheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place.
>
> "These weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of § 2 First...Nevertheless, the result reached today is unavoidable if we are to give effect to all our labor laws--enacted as they were by Congresses of differing political makeup and differing views on labor relations--rather than restrict our examination to those pieces of legislation which are in accord with our personal views of sound labor policy. See Boys Markets v. Retail Clerks Local 770, 398 U.S. 235, 250, 74 LRRM 2257 (1970)." [Emphasis supplied] (at p. 583).

It is apparent from the above language that the Court in Chicago & North Western Railway Company v. United Transportation Union, supra, carefully limited the power of the courts to grant exceptions to Norris-LaGuardia. Indeed, subsequently, this Court,too,in examining the jurisdiction of a Court to issue a preliminary injunction in Emery Air Freight Corporation v. Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 449 F. 2d 586, (2nd Cir. 1971), said, citing New York Telephone Co. v. Communications Workers of America, 445 F. 2d 39 (2nd Cir. 1971):

> "We pointed out,...that the 'generality' of injunctions issued in labor disputes had been 'one of the chief abuses that led to the Norris-LaGuardia Act.' We emphasized that the Act still applies to all labor disputes in which a federal court can issue an injunction..." (at p. 588)

Thus the Courts are still bound to strictly adhere to the tenets of the Norris-LaGuardia Act (29 U.S.C. § 101 et seq.) which, except for very limited exceptions, precludes an injunction arising from a labor dispute.

Judge Ward failed to meet this burden in issuing a TRO against the IAM. He failed to adhere to those strict limitations. He failed to give adequate weight to the rights of the IAM to engage in economic self-help against JAL at the end of the thirty-day status quo period, even though this statutory right has been recently reinforced by the United States Supreme Court stating in Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969):

> "Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help -- 'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration'". (at p. 378)

As the District Court's jurisdictional bounds were overstepped by the granting of the TRO, that order should be vacated by this court.

C. THE COURT BELOW FAILED TO MEET THE PROCEDURAL REQUIREMENTS OF THE NORRIS-LAGUARDIA ACT.

I. THE TEMPORARY RESTRAINING ORDER ISSUED BY THE COURT BELOW IS INVALID AS DEFENDANTS HAD NO OPPORTUNITY TO PRESENT WITNESSES IN THEIR BEHALF.

II. IN ANY EVENT, SAID ORDER CAN BE EFFECTIVE FOR NO LONGER THAN FIVE (5) DAYS.

The Norris-LaGuardia Act is very specific in its statement of what is required from a court before the issuance of any temporary or permanent injunctions in any of the limited cases involving or growing out of a labor dispute where injunctive relief is proper. The law specifically states (29 USC § 107) that no injunction shall issue "except after hearing the testimony of witnesses in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court. . ." . findings of fact required are very specific. They include (a) the commission or threat to commit unlawful acts, (b) irreparable injury, (c) greater injury upon plaintiff than defendant, (d) no adequate remedy at law and (e) failure of public officers to protect plaintiff's properly. While the act provides for the issuance of a temporary restraining order, there must be a showing of fact sufficient to meet the standards set for injunctions set forth above.

The temporary restraining order issued by the Court below for a period from January 22 through Januray 31 was granted under the following circumstances:

1) Plaintiff presented two witnesses who were cross-examined by defendants' counsel.

2) Because defendants were given short notice of the hearing, and were then in the state of California negotiating about the very issues presented in this action, they were unable to attend the hearing.

3) Defendants' application for a continuance was denied (Tr. 41) ( )

4) Defendants were given approximately four days inclusive of a weekend to present affidavits in opposition, in lieu of oral testimony.

5) Plaintiff was given the opportunity to submit reply affidavits.

6) Findings of the facts set forth in § 107 of Norris-LaGuardia were not made.

The Court below erred in issuing the TRO without meeting the procedural requirements set forth above. While plaintiff was able to present witnesses prior to the issuance of the TRO, defendants were not. Nor did Judge Ward make findings of the enumerated facts required by § 107. (Tr.174)( ) When such findings were finally made after the hearing on the preliminary injunction

was completed, the Court refused the plaintiff injunctive relief.

Furthermore, the Court below erred in granting the temporary restraining order for a period exceeding five (5) days. The Norris-LaGuardia Act (§ 107) specifically provides that:

> "Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days."

There is no provision for an extension mentioned in the Act. Nor can Rule 65 of the Federal Rules of Civil Procedure be used to support the issuance of the temporary restraining order for more than five (5) days, as that Rule does not supercede the provisions of Norris LaGuardia. See Rule 65(e).

As the statute is clear as to the time limitations, the order of the Court below must be, if not entirely vacated, limited to a duration of no longer than five (5) days. The order would therefore have expired no later than 5:00 P.M., January 27, 1975. However, defendants respectfully urge that as a matter of law and equity, the temporary restraining order should be vacated in its entirety.

D. THE TEMPORARY RESTRAINING ORDER ISSUED BY THE COURT BELOW WAS OVERLY BROAD AND CONSTITUTED AN UNWARRANTED INTRUSION UPON THE ONGOING COLLECTIVE BARGAINING BETWEEN THE PARTIES CAUSING IRREPARABLE HARM TO DEFENDANTS.

The Court below relied upon the U.S. Supreme Court's decision in Chicago & N.W. Ry. v. United Transportation Union; supra, for the principle that economic self-help by a party to a major dispute under the Railway Labor Act may be enjoined even after the thirty-day "cooling off" period set forth in § 5 (First) [45 U.S.C. § 155 (First)] of the Act has expired. Yet, in granting a temporary restraining order pending its determination of plaintiff's motion for a preliminary injunction, the Court below went beyond even the most liberal interpretation of the aforementioned case and not only directly intruded upon the ongoing collective bargaining between the parties, but also contradicted the very substance of the statutory scheme upon which it predicated its jurisdiction.

In Chicago & N.W. Ry., supra, the Court expressly stated that a strike injunction could issue where it was "the only practical, effective means of enforcing the command of § 2 (First)." (at 582). That section obligates the parties "...to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions,..." [45 U.S.C. § 152 (First)]. But the Court below did much more than restrain a

potential strike; it effectively precluded any meaningful bargaining which could take place during the period of restraint.

Specifically, the Court below ordered that defendants were restrained and enjoined - "1) from directly or indirectly insisting or demanding that JAL bargain with the IAM over the IAM's proposed change in the 'Scope of Agreement' clause in the Agreement between JAL and the IAM,..." 2) from engaging in any form of economic self-help. That initial determination required the defendants to bargain about all other issues in a vacuum, without the ability to assess their import relative to the "Scope" issue. The predicament in which the Court below places a union is readily apparent.

Collective bargaining is a process of give-and-take. Each party has a priority of issues; some are more important than others which means that concessions may be made on the less important issues to make progress on the really key ones. But they are all interrelated. In the context of this action, IAM maintained throughout negotiations that changes in the "Scope" article were essential to the job security of the employees which it represents. Therefore, "Scope" continued to be a subject of the highest priority along with other major items such as wages and pension. Yet the Court below, by

its direction to continue bargaining during the now extended "cooling off" period without discussing "Scope", said in effect to the IAM: "Forget about "Scope" for now, wrap up everything else; but maybe in a few days we will let you put "Scope" back on the table." This type of bargaining requires the complete restructuring of bargaining priorities for the period of restraint with the IAM forced to take positions not indicative of the way it would negotiate were "Scope" still on the table and severely limited in its ability to make concessions in other areas.

Since the Court below specifically indicated that it would, if necessary, scrutinize the bargaining process during the period of restraint in determining whether to grant a preliminary injunction (T. 178) ( ), the IAM was he party which had to suffer undue prejudice and to modify its stance on other issues while waiting for the decision on "Scope".

The Courts have consistently applied a policy of avoiding intrusions upon the process of collective bargaining. In Chicago & N.W. Ry., supra, Justice Harlan noted:

> "...[g]reat circumspection should be used in going beyond cases involving 'desire not to reach an agreement' [re: injunctive relief], for doing so risks the infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements" (402 U.S. at 579 n. 11)

Instead of merely maintaining the status quo of the bargaining process, the Court below altered it significantly, which is clearly repugnant to national labor policy. In NLRB v. American National Insurance Co., 343 U.S. 395 (1952), which dealt with the analogous "duty to bargain in good faith" under the Labor Management Relations Act, the U.S. Supreme Court refused to allow enforcement of that portion of a National Labor Relations Board ("NLRB") order which prohibited an employer from bargaining for any management functions clause covering a condition of employment. The Court stated:

> "...[I]t is equally clear that the Board [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (at p. 404)

Since under the Railway Labor Act it is the Court, not an administrative agency such as the NLRB which historically enforces the bargaining duty, the above statement is equally applicable herein.

In light of the prejudice to the defendants resulting from the District Court's intrusion into the collective bargaining process between the parties hereto, the temporary restraining order was improperly granted and should be vacated in its entirety.

POINT II

THE IAM'S PROPOSAL FOR A CHANGE IN THE "SCOPE" ARTICLE IS A BARGAINABLE ISSUE UNDER THE RAILWAY LABOR ACT, AS IT BEARS A NECESSARY RELATION TO RATES OF PAY, RULES OR WORKING CONDITIONS.

A. BARGAINABLE SUBJECTS UNDER THE RAILWAY LABOR ACT ENCOMPASS A WIDE SPECTRUM.

The RLA itself defines the subjects of bargaining in very general terms. These are the following:

1) Matters concerning rates of pay, rules or working conditions. [§ 2 (First)].

2) Matters concerning union security and check-off agreements. [§ 2 (Eleventh)].

Aside from specifying these areas, the RLA is totally silent on the particular subjects of bargaining. Furthermore, there is no administrative agency such as the National Labor Relations Board to which the parties may turn to determine bargainability. Therefore, the responsibility for determining whether a subject is bargainable has fallen upon the courts. See, e.g., Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960). However, the U.S. Supreme Court, in determining the extent of this power has stated:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulations of wages, hours

> or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be as good as they will bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions." (Terminal R.R. Ass'n. v. Brotherhood of R.R. Trainmen, 318 U.S. 1 at 6 (1943).

The Court, in Order of R.R. Telegraphers, supra, made two key points with respect to the scope of collective bargaining under the RLA:

> "In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves." (362 U.S. at 338) [Emphasis supplied]

While the above statement involved the railroads, its language is equally applicable to the airlines.

Unlike the situation under the LMRA, there are relatively few cases in which courts have considered and decided whether a particular subject falls within "rates of pay, rules, or working conditions." Subjects which have been held to be within

the bargainable category include:

a) Additional training required to retain a particular position. Northwest Airlines, Inc., v. IAM, 185 F. Supp. 129 (DC Minn. 1960).

b) License requirement for a particular position. Pan American World Airways, Inc. v. FEIA, 306 F 2d 840 (2nd Cir. 1962).

c) Seniority rights after a merger. O'Donnell v. Pan American World Airways, Inc. 200 F. 2d 929 (2nd Cir. 1953).

d) Seniority rights of replacements for strikers. FEIA v. Eastern Airlines, Inc. 243 F. Supp. 701 (SDNY 1965)

e) Superseniority for strike replacements. Airline Pilots Association v. Southern Airways, Inc. 49 LRRM 3145 (MD Tenn. 1962), not otherwise reported.

f) Purchase and maintenance of uniforms. United Airlines, Inc. v. Industrial Welfare Comm'n., 28 Cal. Rptr. 238 (1963).

g) Pension plans. Elgin, Joliet & Easter Railway Co. v. Brotherhood of R.R. Trainmen, 302 F. 2d 540 (7th Cir. 1962).

h) Compulsory retirement. McMullans v. Kansas, Okla. & Gulf Railway, 229 F. 2d 50 (10th Cir. 1956).

i) Check-off agreements for union dues. Manning v. American Airlines, Inc., 329 F. 2d 32 (2nd Cir. 1964).

j) Job security regarding station phase-outs. Order of R.R. Telegraphers, supra.

k) Rescheduling of train runs. Rutland Railway v. Brotherhood of Locomotive Engineers, 307 F. 2d 21 (2nd Cir. 1962).

l) Physical fitness and examinations for employees. Wilburn v. Missouri-Kan.-Tex. Railway, 268 S.W. 2d 726, (Tex. 1954).

m) Leasing out of facilities formerly operated by employer. United Industrial Workers of Seafarers International Union v. Board of Trustees of Galveston Wharves, 351 F. 2d 183 (5th Cir. 1965).

n) Sub-contracting out of work performed by employees. KLM Royal Dutch Airlines v. TWU, 56 LRRM 2205 (EDNY 1964), not otherwise reported.

o) Job security on termination of employer's contract with railroad. Pullman Company v. Order of Railway Conductors and Brakemen 316 F. 2d 556 (7th Cir. 1963).

It is apparent from the above cases that the requirements of bargaining are expansive and expanding under the RLA.

B. THERE IS NO "MANDATORY-PERMISSIVE" DICHOTOMY UNDER THE RLA; SUBJECTS ARE EITHER BARGAINABLE OR UNLAWFUL.

There is one major point of difference in the treatment of subjects of bargaining between the LMRA and the RLA. Under the LMRA, the courts have developed the "mandatory-permissive" dichotomy when discribing subjects of bargaining. The parties must bargain about mandatory subjects, but they may refuse to bargain about permissive subjects. The import of this dichotomy is that the parties may reach an impasse on mandatory subjects, but must withdraw permissive subjects before an impasse is reached. NLRB v. Wooster Div. of Borg-Wa. er Corp., 356 U.S. 342 (1958). Insisting to the point of impasse that a permissive subject of bargaining be included in the collective bargaining agreement is an unfair labor practice under §8(a)(5). Borg-Warner Corp., supra.

There is no unfair labor practice akin to § 8 (a)(5) under the RLA. The only remedy available is an order enjoining self-help until a party has exerted every reasonable effort to reach an agreement. Chicago & N.W. Ry. v. United Transportation Union, 402 U.S. 570 (1971). Case law under the RLA makes no reference to "mandatory" or "permissive" subjects, only bargainable subjects (as described in the previous section) and unlawful subjects. Judge Ward, in his Opinion, however, has grafted this dichotomy on the RLA.

The types of subjects which have been held unlawful consist of the following:

(a) Requiring the use of a dues deduction form which restricts an employee's right to revoke his wage assignment after one year. Felter v. Southern Pacific Co., 359 U.S. 326 (1959). The court found a violation of RLA § 2 (Eleventh) (b).

(b) Requiring the employer to recognize the union in an area not within its craft. In Southern Pacific Co. v. Switchmen's Union, 356 F. 2d 332, 334, (9th Cir. 1966), the court held that the union's proposal was not directed to the retaining of work or even the securing of additional work by that craft. Instead it was directed to a change in craft lines--an expanding of the switchmen's craft to encompass the work now assigned to the craft of the trainmen. A violation of RLA § 2 (Ninth) was found.

(c) Requiring that striking pilots surrender the right to have their grievances resulting from discipline adjusted through the machinery provided by the RLA. In Airline Pilots Association v. Southern Airways, Inc. 49 LRRM 3145, 3153 (MD Tenn. 1962), not otherwise reported, the court held that the above demand on the part of the carrier violated the duty, under § 204 of the RLA, to refer disputes growing out of grievances to a system board of adjustment.

An analysis of the above cases leads to the conclusion that an unlawful proposal will be found to exist only where it violates a specific provision of the RLA. This gives credence to the proposition, keeping in mind the trend under the RLA to broaden the scope of

bargainability, that even "permissive" subjects under the LMRA would be within the meaning of rates of pay, rules and working conditions under the RLA as long as the proposal is not specifically violative of the latter Act.

In Chicago and North Western Railway v. United Transportation Union, supra, the Supreme Court cautioned against the drawing of the type of parallel between the NLRA and the RLA drawn by Judge Ward. The Court stated:

> "[P]arallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." (at p. 579, n. 11) [emphasis added]

As Judge Ward, in his Opinion, has found nothing unlawful in defendants' demand on "Scope" in negotiations with JAL, then there is no basis for his conclusion that there is no duty to bargain over that proposal.

C. DECISIONS CONCERNING FUTURE SUBCONTRACTING ARE BARGAINABLE.

The U.S. Supreme Court has held that an employer's decision to subcontract work then being performed by members of the bargaining unit was a mandatory subject of bargaining under the LMRA. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). The majority of the Court state as follows:

> "The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See Order of Railroad Telegraphers v. Chicago & N.W.R. CO., 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment, which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit." (at 210)

Under the RLA, decisions concerning future subcontracting have been presumed to be bargainable. KLM Royal Dutch Airlines v. TWU, 56 LRRM 2205 (EDNY 1964), not otherwise reported.

D. THE IAM'S PROPOSAL TO ELIMINATE PRESENT SUBCONTRACTING AT CERTAIN LOCATIONS IS CLEARLY BARGAINABLE.

In essence, IAM is seeking to end the practice of subtracting certain operations at JAL's New York, San Francisco, Los Angeles and Anchorage stations. Thus a variation of the Fibreboard situation is presented, one which has apparently not been litigated heretofore. Yet the principles which have been developed as they relate to bargainability under the RLA lead to the conclusion that the IAM's demand for a change in the "Scope" article is clearly lawful and bargainable.

1) The parties have previously bargained about, and indeed, agreed to, changes in the "Scope" article.

As mentioned previously, the U.S. Supreme Court, in Order of R.R. Telegraphers, supra, at 338 specifically noted that the idea of what is bargainable has been greatly affected by the practices and customs of the parties themselves.

It is incontrovertible that JAL agreed to changes in the "Scope" article, resulting in a curtailment of subcontracting, in the previous collective bargaining agreement between the parties (effective March 1, 1972 to Octover 31, 1973). In Appendix D of that agreement (Tr.Exh.A, pp. 67-68) ( ), a Letter Agreement, pertaining specifically to the same items

which are the subject of the "Scope" proposal presently under attack by JAL, provides as follows:

"JAPAN AIR LINES
American Region, Executive Office
655 Fifth Avenue
New York, N.Y. 10020
Telephone: (212) 758-8850
Cable Address: Japanair New York

March 20, 1973

Mr. Fusao Ogoshi
Senior Business Representative
International Association of Machinists
and Aerospace Workers
Hawaiin District Lodge No. 151
1001 Dillingham Boulevard, Room 210
Honolulu, Hawaii 96817

Dear Mr. Ogoshi:

This letter will confirm the understandings reached in Mediation Conferences regarding the Union's request that the Company furnish a definite timetable for manning all Stations with Company employees, and for certain changes in ARTICLE I (SCOPE OF THE AGREEMENT).

The Company agrees that it will not contract out work at Stations where its IAM employees are currently doing work in the classifications (Crafts and Classes) covered by the Agreement, without prior notice to and negotiations with the Union (IAM).

The Company agrees to open certain jobs at JFK and SFO, as follows:

A. Beginning no later than October 1, 1973, the maintenance work performed on the equipment in the Cargo Warehouse at JFK International Airport, New York, now performed by Mohawk, will be performed by employees of the Company who are members of the Union.

B. The Company employees in the classification of Plant Mechanics will perform work in connection with the maintenance and repairs of the ground equipment at SFO and at JFK as soon as the Company can lease adequate space to establish its own ground equipment maintenance facilities at each of said Stations.

The Company is currently making every effort to secure space for the ground equipment maintenance facilities at SFO and at JFK and will continue its efforts. Periodic progress reports will be made to the Union in connection with this matter.

In addition, there will be no layoffs (furloughs) as set forth in the Letter of Agreement between Japan Air Lines Co. Ltd., and the Union.

Very truly yours,

JAPAN AIR LINES CO., LTD.

s/ Shigeo Kasumi
Administration Manager
The Americas"

SK:pb

Furthermore, during the negotiations pertaining to IAM's Section 6 notice relating to "Scope", which began on November 6, 1973, at no time did JAL proclaim that IAM's proposal to eliminate subcontracting was unlawful or unbargainable--until November 13, 1974, shortly after the IAM membership failed to ratify JAL's proposed "package". (Tr. 160, 161, 169-171 **)

( ).

JAL's present position, therefore, is completely contrary to the position regarding "Scope" which it has taken in the

---

**References following are to transcript of continuation of hearing on January 31, 1975 and following.

past, and should not overrule its past bargaining history on that issue.

2) The present subcontracting has an adverse effect upon the conditions of employment existing at stations manned by IAM members.

Contrary to the conclusion of Judge Ward, the evidence presented shows that the extent of present subcontracting by JAL presents a threat to the job security of IAM members throughout the JAL system. JAL's subcontracting practices present an immediate, adverse effect on present bargaining unit employees. Aside from the fact that the presence of subcontracted employees gives the carrier "leverage" in negotiations which could be detrimental to bargaining unit members, a very real threat to the job security of bargaining unit members has existed by virtue of the extent of present subcontracting. IAM members may be laid off while the subcontracts are being performed by those with no higher skills than IAM members. IAM members can do this work and, in fact, do this same work at various stations in all the classifications set forth in the collective bargaining agreement (Def. Exh. A, p.1).

As stated in the affidavit of Mr. Ogoshi (Def. Exh. D, at pp.12-13) ( ) on August 3, 1974, JAL delivered a letter in-

forming IAM Lodge 151 that nine bargaining unit employees (in Honolulu) would be laid off as a result of the increased price of fuel (despite a "no furlough" clause in the existing agreement). Although Mr. Quick tried to negotiate an agreement to provide those persons being laid off the opportunity to perform similar functions at its other (subcontracted) locations in the continental United States, JAL refused to permit this. It then became clear that a revision of the "Scope" clause was necessary to ensure basic job protection for bargaining unit members. It was only after the IAM commenced an action in the U.S. District Court for the District of Hawaii (74 Civ. 210), that JAL reversed its position and withdrew its notice of intention to lay-off the nine bargaining unit employees.

3) A change in the "Scope" article does not intrude upon basic management functions.

Judge Ward has found that the "Scope" proposal for the curtailment of subcontracting is non-bargainable, at least in part, because it intrudes upon the "managerial right to determine the scope of the enterprise." Yet an analysis of the actual effects of such a proposal shows that JAL's enterprise would remain essentially unchanged.

a) IAM's proposal does not require the establishment of new stations or routes.

b) IAM's proposal does not require the establishment of new classes or crafts.

c) IAM's proposal does not require instantaneous cancellation of subcontracts, only an orderly phase-out.

d) IAM's proposal contemplates a lawful accretion to the bargaining unit, which has been specifically agreed to by JAL in Article I, Section D of the collective bargaining agreement:

> "If, during the life of this agreement, the Company should establish its own maintenance, ground service or stores facilities at any other base within the United States, its territories and/or possessions, the Company and the Union will meet and negotiate wage rates and other conditions to govern the employees at the new base only prior to, or as near as possible after, the opening of the facility."
> (Tr. Def. Exh. A, at p. 2)( )

e) The accretion to the bargaining unit would represent only a 1% increase in the total number of JAL employees (based upon JAL's own figures).

Although JAL has argued that it would be required to make significant capital expenditures, it has chosen to withdraw the details of these projected expenditures as compared to its costs for having the work performed by subcontractors rather than present them to the court and the IAM for meaningful analysis (Tr. 139-147*, Def. Exh. D at p. 9) ( ). Under these

*Tr of January 16

circumstances, JAL has no standing to assert that the expenditures constitute "considerable capital investment." Even if its calculations were to be considered, based upon its own figures, the increase in JAL's capital investment would amount to only 2%. Faced with similar employer arguments, the NLRB has determined that they are not dispositive of the question, but rather must be balanced against the "employee's interest in the protection of his livelihood." See Ozark Trailers, Inc., 161 NLRB 561, 566 (1966).

Appellants also point out to this court that use of any "management prerogative" standard should be curtailed. Those earlier cases holding a large area exempt from bargaining as "management prerogative"have been effectively overruled as the requirements of bargaining have expanded. In Order of Railroad Telegraphers, supra, the Supreme Court specifically disagreed with the Court of Appeals' reliance on the doctrine of "management prerogative":

> "We cannot agree with the Court of Appeals that the union's efforts to negotiate about the job security of its members 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.' " (at p. 336)

4) IAM's demand for a change in the "Scope" article violates

no specific provision of the Railway Labor Act.

A proposal for the phase-out of subcontracting violates no specific provision of the RLA. IAM does not seek to usurp work belonging to any other craft or class. It merely seeks to strengthen job security for its members in the face of possible and probable cutbacks in JAL operations. In Southern Pacific Co. v. Switchmen's Union, supra, at 334, the court indicated that there was nothing unlawful about this desire of a craft to secure additional work.

Based upon the foregoing, it is submitted that IAM's proposal for a change in the "Scope" article bears a necessary relation to rates of pay, rules, or working conditions, violates no provision of the Railway Labor Act, and, in fact, has been conceded to be bargainable by JAL in the past. Therefore, such proposal is unquestionably bargainable.

CONCLUSION

For all of the reasons set forth above, the defendants-appellants respectfully request that this Court reverse the order of the District Court granting a nine (9) day temporary restraining order on January 22, 1975, and that this Court reverse the final declaratory judgment of the District Court insofar as it declares that "scope" is not a mandatory subject of bargaining.

Dated: New York, New York
January 16, 1976

Respectfully submitted,

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Defendants-Appellants
1501 Broadway
New York, New York 10036
(212) 221-2550

Of counsel:

Sheldon Engelhard
Deborah A. Watarz
Robert L. Jauvtis

ADDENDUM

Norris LaGuardia Act

Railway Labor Act (Excerpts)

Federal Rules of Civil Procedure - Rule 65

NORRIS–LAGUARDIA ACT

47 Stat. 70 (1932), 29 U.S.C. §§ 101–15 (1970).

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Sec. 1. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Sec. 2. Public policy in labor matters declared.

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Sec. 3. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts.

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the grant-

ing of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 4. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies.

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 7. Issuance of injunctions in labor disputes; hearings; findings of court; notice to affected persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 8. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief.

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 9. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions.

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 10. Review by Court of Appeals of issuance or denial of temporary injunctions; record; precedence.

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Sec. 11. Contempts; speedy and public trial; jury.

In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.*

Sec. 12.* Contempts; demand for retirement of judge sitting in proceeding.

The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the

* Sections 11 and 12 were repealed by Act of June 25, 1948 (62 Stat. 862), a codification of the provisions of Title 18 of the United States Code. The substance of Section 11 was reenacted in the same Act (62 Stat. 844, 18 U.S.C. § 3692 (1970)); the substance of Section 12 is now found in Rules 42(a) and (b) of the Federal Rules of Criminal Procedure.

proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Sec. 13. Definitions of terms and words used in chapter.

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) be- the case involves any conflicting or competing interests in a one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 14. Separability of provisions.

If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Sec. 15. Repeal of conflicting acts.

All acts and parts of acts in conflict with the provisions of this Act are repealed.

RAILWAY LABOR ACT

44 Stat., Part II 577 (1926), as amended by 48 Stat. 1185 (1934), 49 Stat. 1189 (1936), 54 Stat. 785, 786 (1940), 64 Stat. 1238 (1951), 78 Stat. 748 (1964), 80 Stat. 208 (1966), and 84 Stat. 199 (1970);
45 U.S.C. §§ 151–88 (1970)

TITLE I

Sec. 1. Definitions.

When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia,

or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This Act may be cited as the "Railway Labor Act."

Sec. 2. General purposes.

The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or

out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General duties.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives.

Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work

therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden.

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representative; time; place; private agreements.

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 6 forbidden.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Notices of manner of settlement of disputes; posting.

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified

by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties.

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated

representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

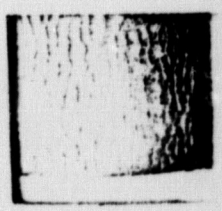
(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 3 of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

Sec. 4. National Mediation Board.

First. Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal.

The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. Each member of the Mediation Board in office on January 1, 1963, shall be deemed to have been appointed for a term of office which shall expire on July 1 of the year his term would have otherwise expired. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in



office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this Act.* No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. Chairman; principal office; delegation of powers; oaths; seal; report.

The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. Appointment of experts and other employees; salaries of employees; expenditures.

The Mediation Board may (1) subject to the civil service laws, appoint such experts and assistants to act in a confidential capacity and such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with the Classification Act of 1949, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incured for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph [x] of section 3 of this Act, and boards of arbitration, in accordance with the provisions of this section and sections 3

* Each Board member also receives a salary, currently (as of February 14, 1969) in the amount of $38,000 per year. See 5 U.S.C. § 5315 (and note following) (1970).

and 7 of this Act, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. Delegation of powers and duties.

The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, [any] such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. Transfer of officers and employees of Board of Mediation; transfer of appropriation.

All officers and employees of the Board of Mediation (except the members thereof, whose offices are abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

Sec. 5. Functions of Mediation Board.

First. Disputes within jurisdiction of Mediation Board.

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents.

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as

provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the

Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

Sec. 6. Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

TITLE II

CARRIERS BY AIR

Sec. 201. Application of title I to carriers by air.

All of the provisions of title I of this Act except section 3 are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Sec. 202. Same; duties, penalties, benefits, and privileges.

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 of this Act.

Sec. 203. Disputes within jurisdiction of Mediation Board.

The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

Rule 65. Injunctions.

(a) PRELIMINARY INJUNCTION.

(1) NOTICE. No preliminary injunction shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is di-

rected consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who re-

ceive actual notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTIONAL CASES. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, USC, §2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, USC, §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

History of Rule

Subdivisions (a) and (b) were amended in 1966; subdivision (c) was amended in 1946 and again in 1966; subdivision (e) was amended in 1948; subdivision (d) remains unchanged.

Subdivision (a)

1966 Amendment

Subdivision (a) was amended in the following respects (matter stricken out is in brackets; new matter is in italics):

(a) Preliminary [; Notice] *Injunction.*

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

Copy Received

POLETTI F & ... & GARTHER

Attorney for PLAINTIFF - APPELLEE

Date 1/19/76

Time 4:55 P.M.